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Rights, Welfare and Law. Legal Aid Advocacy in Austerity Britain

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Background

This qualitative in-depth research highlights particularly vulnerable categories of people who are at risk of being denied access to justice under the new guidelines set out in the LASPO Bill. We present three case studies involving different kinds of vulnerability: inexperience resulting from youth and a deprived background, poor language skills coupled with family breakdown and systemic failure, and mental illness. These findings are based on a study of civil legal aid cases as they progress from initial consultations in the offices of two London legal service providers to their resolution. Methodologies used include participant observation, semi-structured interviews, and analyses of how legal aid case work and documents mediate the spaces between 'lived' administrative/legal practices, and official guidelines. The focus is on the ways in which legal matters fit within wider, often divergent institutional and social contexts and how the law becomes actualised through the everyday interactions of bureaucratic officers, case workers and their clients.

Key findings

Legal services providers offset systemic failure and make possible access to justice in several key ways:

- Much of the advisers' work is aimed at halting the 'cascading' of problems typically created when one of a range of means-tested benefits is suspended. In a scenario commonly observed by us, one such suspension triggers the revocation of other benefits, overpayment demands and rent arrears that can easily result in financial ruin and homelessness. By addressing problems within the limited appeal time-frames, advisers prevent escalating costs to the public purse. While it is hoped that such systemic design flaws will be eliminated by the Universal Credit, they are likely to persist over the next decade whilst the new system is implemented. Legally aided assistance remains vital during this early 'teething' period.
- The LASPO Bill retains legal aid cover for people threatened with impending homelessness. However, this may well create a perverse incentive to allow problems to compound and escalate until eligibility conditions are fulfilled. In our experience tackling problems at such a late stage is much more difficult (if not indeed impossible) and the costs in human and financial terms far greater (as in the case of Katende, below).
- As the case studies illustrate, legal aid advisers negotiate directly on behalf of vulnerable clients whose cases have merit but who are unable competently to represent themselves. What makes them particularly effective is a combination of professional authority and long term established practical collaborations with government agencies. The 'symbolic capital' of the law centre ensures that cases are judged on their merit rather than the plaintiffs' ability to speak for themselves.

- Such advocacy plays a key role in ensuring the implementation of laws and procedures that are theoretically in effect yet may be ignored in practice (the case of Mr Patel*, below). We observed several cases in which the advisers challenged government agencies to fulfil their legal obligations when they had failed to do so. Had this support not been in place, clients would have lost appeals and faced the possibility of financial ruin through no fault of their own.
- Advisers also fulfil a key role in enabling clients to become system-literate, thus facilitating the smoother functioning of the system. They routinely instruct clients of their responsibilities as well as rights, stressing correct ways to approach problems using state institutional frameworks, and helping to save taxpayer money in the process.

We thus recommend that:

- In order to prevent perverse incentives to delay the addressing of problems until they are eventually deemed eligible for legal aid, legal aid cover should be retained for all welfare benefits appeals. This type of case represents the key to halting problem clusters at the source, as the cases of Patel and Katende illustrate.
- Since much legally aided work is the result of systemic failure in government offices, a 'polluter pays' clause on the organisations in question should be introduced to subsidise cost burdens (see e.g. the case of Patel).
- Legal aid cover for debt, housing and welfare benefit appeals should be retained for disadvantaged young people between the ages of 18 and 25 (the case of Katende).
- Legal aid cover for debt, housing and welfare benefit appeals should be retained for people diagnosed with severe mental illness even if their income will be above the new, stricter thresholds (the case of Ms Smith).
- Ideally the scope of legal aid cover should be drastically cut only after the new Universal Credit system has been implemented.

Case studies

Mr. Katende - Housing (the impending homelessness of a young person)

Ironically it was an attempt to stop depending on benefits that initiated the chain of events which led to Mr Katende, a 22 year old Ugandan-born British citizen, being evicted from his council flat. His case illustrates what is likely to happen if, following LASPO proposals, vulnerable people must wait until threatened with homelessness to access legal aid funded advice. Katende arrived in the UK as a 13 year old asylum seeker and was raised in foster care. Aged 17 and with no family support network apart from his elderly foster carer (whom he has shielded from his current problems so as not to upset her) he was placed in the council flat from which he is being evicted. He became a college student and tried to acquire work experience by volunteering for various campaigns and taking on paid jobs offered by time-limited NHS projects. Whilst in such employment he informed Jobcentre Plus, requesting suspension of his Job Seeker's Allowance, but did not realise he should also liaise with Housing Benefits, resulting in the temporary suspension of his rent subsidy. He discovered the accruing rent arrears at a time when he had just suffered the breakdown of a long term relationship and lost access to the social worker who normally advised him (owing to budget cuts). Unable to handle the pressure, he dropped out of college in his last year and, after a failed attempt to tackle the problem, ignored it for eight months. Now he is

* The name has been changed.

about to receive an eviction warrant which he plans to challenge, representing himself before the Tribunal. With the help of Mr. Bajić, his legal aid funded adviser, he has begun making payments to clear £2000 rent arrears. However, at this late stage in eviction proceedings the prospects of retaining the flat are bleak, and he is entirely at the mercy of the judge.

A sad consequence of this is that he must give up his place on a prestigious Global Exchange programme training NGO volunteers in Ethiopia, (he was one of only 24 people selected from thousands of applicants). Going abroad now would trigger the suspension of his housing benefits, leading to the loss of his home. Mr. Katende, who spent seven years in the asylum system, finally winning his case unexpectedly thanks to a hand written letter he sent to the Home Office, is reasonably system literate and resourceful. Yet still his ignorance of the law has placed the potentially bright future he had been building on indefinite hold. His advisor, Mr. Bajić spent considerable time instructing him regarding his responsibilities as well as rights, to prevent such problems arising again. Whilst under the LASPO Bill people threatened with homelessness will still receive last-resort advice, it is doubtful whether the complex and interdependent causes of problems can be effectively tackled at this advanced stage. The risk is that public money will simply be thrown at the immediate symptom – homelessness – without addressing the causes.

Mr Patel - Benefits Appeal (for Child Tax Credit overpayment demand)

This case illustrates the problems faced by people with severe language difficulties when they encounter system failure. It also highlights advisers' role in promoting the implementation of new laws. Mr Patel, a native Punjabi speaker, recently experienced the disruption caused by marital breakdown, coupled with additional anxiety brought on by a demand to repay a substantial amount of Child Tax Credit to HMRC. The 'overpayment request' stated that the amount was owed because he had failed to inform HMRC of his changed domestic circumstances, but Mr. Patel and his wife would have been entitled to the same amount of money had they simply done this. In effect there was no 'overpayment' – this was a fine for failing to notify HMRC of the separation. Since Mr. Patel lives on Job Seeker's Allowance, most of which goes towards rent paid to a landlord who does not accept Housing Benefits, repaying £360 was well beyond his means.

Benefits claims lay the burden of proof on the claimant, and when a claim is rejected the decision remains right in the eyes of the law unless it is appealed. As Mr. Bajić put it, "you're always guilty unless you prove otherwise. It's upside down, not like in court...In effect they are saying 'prove us wrong'". In the case of HMRC demands, there is no appeal tribunal – to contest these, one must negotiate directly with HMRC. Poor language skills tend to foster a lack of basic system literacy, rendering such negotiation impossible. Furthermore, when adviser Mr Bajić spoke to HMRC, requesting 'notional offsetting' – a payment option legally established since 2010, whereby the 'overpayment' is subtracted from the Tax Credits to which the client is eligible, effectively cancelling out the debt – it transpired that the HMRC officer in question had never heard of this, although after some consultation the option was acknowledged. When even a professional adviser had difficulty actualising his client's right to offset the charges, what chance would Mr. Patel have stood on his own?

In our experience, cases involving system failure were far from rare. In another instance, a diagnosed schizophrenic nearly lost her appeal against a decision to suspend her Income Support for Disability because the court did not disclose to her the 'submission' (a document based on which she can prepare her defence) ahead of the court hearing. In another case, an application for Job Seeker's Allowance exceeded the deadline for a decision whilst the client went into rent arrears leading to her eviction.

Ms Smith - Debt (which, compounded mental illness, may escalate to homelessness)

Ms Smith may be rendered homelessness as a result of a trivial debt of around £700 – a year's arrears

in maintenance fees for the building in which her council flat is located. A diagnosed schizophrenic who regularly experiences quite serious symptoms - hearing voices, confused thinking, severe fatigue - last year she attempted to solve the problem on her own and found herself literally starving in order to meet the large payments demanded by the council so as to clear the debt before the end of that financial year. In arrears again, she is facing intolerable pressure which not only exacerbates her illness and anxiety, but forces her to consider cross subsidizing the debt with money from her care in the community budget. This is intended to pay for 'occupational therapy' and has in effect allowed her to maintain a semi functional career as a professional artist. As a home owner, Ms. Smith might, on the face of it, appear less vulnerable than some. Yet she is close to becoming homeless if the council chooses to act on a forfeiture clause in the lease. The council did not inform her of a different payment option, whereby it can recover the fees from her mortgage lender, who is insured against such contingencies.

With a relatively small yet decisive act of assistance, her advisor drew up a financial plan so that she would be able to organise her expenditure and began negotiations for an acceptable repayment schedule. As a home owner, Ms. Smith would not be able to access legal aid funded advice in the future. Her case highlights how important access to advice is for people with mental illness who are trying to live normal lives. There is a poor understanding of mental illness in public services, such that mentally ill people who appear bright and competent on the surface are perceived as insincere and suspected of exaggerating their predicament. When Ms. Smith tried to negotiate a payment schedule on her own, council bureaucrats disregarded her condition, treating her as fully competent. In an adversarial bureaucratic culture, she was, as she put it, "eaten alive" by officers who pressured her to fall in line with unrealistic payment demands.

Conclusion

Though these cases are varied, each illustrates in its own way the wisdom of early intervention to prevent the 'cascading' of problems. Whilst the new Universal Credit aims to eliminate systemic factors known to create such escalation, its implementation is expected to take a decade, to say nothing of 'teething problems' that can probably be expected at the outset. Cutting legal aid support before the new arrangements are firmly in place means that next year people like Mr. Patel or Ms. Smith would be left to fend for themselves, a task to which they are patently unequal. As Mr. Katende's case shows, even people who are relatively system literate and on the whole proactive can face a losing battle if their circumstances are tipped into a spiral of accruing rent arrears as a result of personal crisis or simple inexperience.

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